IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BONNIE SMITH,	:	
Plaintiff,	:	
vs.	:	**CIVIL NO. 06-1473**
GENESIS VENTURES I, LLC, *et al.*,	:	
Defendants.	:	

MEMORANDUM OPINION AND ORDER

Rufe, J. **December 8, 2006**

Before the Court is Plaintiff Bonnie Smith's Motion for Leave to File an Amended Complaint [Doc. # 28], in which she seeks to add four additional defendants.[1] Defendants Genesis Ventures, Pennrose Properties, and Inns of Distinction all oppose the Motion. Based on a review of the briefs, the applicable law, and the entire record in this case, the Court will grant the Motion in part, subject to the restrictions contained in this Memorandum Opinion.

[1] In a flurry of court filings, Smith has filed no fewer than three proposed amended complaints. The first is attached as an exhibit to the instant motion [Doc. # 28, Ex. A], as the Court instructed her to do in its Order of September 22, 2006 [Doc. # 26]. Smith then submitted a second proposed amended complaint with her Reply Brief [Doc. # 31, Ex. A-2]. Finally, Smith filed a Second Motion for Leave to File Amended Complaint, with yet another proposed amended complaint attached [Doc. # 34, Ex. A].

Noting that the second proposed amended complaint was filed in a manner not contemplated by the Court's previous Orders, and noting that Smith has since withdrawn her third proposed amended complaint by Praecipe [Doc. # 36], the Court has reviewed only the first proposed amended complaint, and tailored its ruling in this Memorandum Opinion and Order accordingly.

I. BACKGROUND

This is an employment-discrimination case. Plaintiff Smith filed her Complaint on April 7, 2006, asserting claims under the Age Discrimination in Employment Act ("ADEA")[2] (Counts I and II); the Pennsylvania Human Relations Act ("PHRA")[3] (Count III); the Family and Medical Leave Act ("FMLA")[4] (Count IV); and the Consolidated Omnibus Budget Reconciliation Act ("COBRA") of 1985[5] (Count V). Smith's Complaint alleges the following facts:

Smith began working at the Wyndham Hotel in Reading, Pennsylvania, on April 3, 2003. At the time, she was about 56 years old. The Defendants[6] initially hired Smith as the Director of Sales, Marketing & Catering. On December 13, 2004, the Defendants demoted her to Director of Catering, a position that paid $7000.00 less in annual salary, and that had fewer duties and responsibilities. After demoting her, the Defendants hired a substantially younger person to become the Director of Sales, Marketing & Catering.

On January 5, 2005, Smith requested a medical leave of absence to receive knee

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[2] 29 U.S.C. §§ 621–634 (2000).

[3] 43 Pa. Cons. Stat. Ann. §§ 951–963 (2000).

[4] 29 U.S.C. §§ 2601–2654 (2000).

[5] COBRA is codified in scattered titles of the U.S. Code, but the relevant portion for the purposes of this case is codified at 29 U.S.C. §§ 1161 to 1168 (2000).

[6] Smith treats the three named defendants—Genesis Ventures I, LLC; Inns of Distinction, Inc.; and Pennrose Properties, Inc.—collectively in her Complaint, and refers to them as "Defendants." Smith alleges that these three entities collectively owned and managed the Wyndham Hotel when she was demoted and fired.

surgery, which the Defendants approved. About nine weeks later, on March 12, 2005, the Defendants sent Smith a letter informing her that her employment at the Wyndham was terminated.

Smith's Complaint asserts that Defendants: (1) violated the ADEA and the PHRA by demoting her based on her age and replacing her with a substantially younger employee; (2) violated the FMLA by refusing to reinstate her to her job after her surgery; and (3) violated COBRA by failing to notify her of her rights to continuation of medical-insurance coverage.

The proposed amended complaint names four additional defendants: (1) Frank Reagoso, Jr., president of Defendant Inns of Distinction; (2) John B. Rosenthal, Chairman of Defendants Genesis and Pennrose; (3) DePalma Hotel Corporation, which has allegedly replaced Inns of Distinction as the management company for the Wyndham; and (4) FWHI Beverage Company, a wholly owned subsidiary of DePalma. No additional substantive theories for relief are added.

Smith wants to sue Reagoso and Rosenthal as individuals, claiming that they personally participated in the unlawful employment action against her. She claims that she has obtained new information through discovery that indicate that Reagoso and Rosenthal personally directed the adverse actions taken against her.

She also wants to sue DePalma and FWHI Beverage, which allegedly took over as managing agents of the Wyndham on May 1, 2005, less than two months after she received her notice of termination from the Defendants.[7] She claims that liability attaches to them as

[7] Pl.'s Mot. for Leave to File Am. Compl. [Doc. # 28], Ex. A ("Proposed Am. Compl."), ¶ 26.

successors-in-interest to Defendants.

II. DISCUSSION

Under Federal Rule of Civil Procedure 15(a), which governs amendment of complaints, "leave shall be freely given when justice so requires." A decision to allow an amendment is committed to the trial court's discretion, and will be reversed only for an abuse of that discretion.[8]

The Supreme Court laid out the factors to consider when deciding a motion for leave to amend in Foman v. Davis.[9] The Court stated that a district court generally should grant such a motion to amend unless the record reveals (1) plaintiff's undue delay, (2) plaintiff's bad faith, (3) plaintiff's dilatory motive, (4) repeated failure to cure deficiencies by amendments previously allowed; (5) undue prejudice to the defendants caused by the amendment; and (6) futility of amendment.[10] In their briefs, Defendants raise objections based on prejudice, bad faith, and futility.

A. Prejudice

The Third Circuit has interpreted the Foman factors to mean that "prejudice to the non-moving party is the touchstone for the denial of an amendment."[11] Indeed, if the amendment

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[8] Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 330 (1971).

[9] 371 U.S. 178 (1962).

[10] Id. at 182.

[11] Lorenz v. CSX Corp., 1 F.3d 1406, 1414 (3d Cir. 1993).

does not prejudice the nonmovants, then it should be allowed.[12]

Here, Defendants Genesis and Pennrose argue that "Smith's inclusion of four new defendants would alter and vastly expand the scope of this action, requiring the parties to engage in additional and extensive discovery, and significantly delay the proceedings."[13] Smith does not rebut this contention in her response, and indeed, does not address the issue of prejudice.

The Court recognizes that adding these four additional parties will add to the lengthiness and cost of the litigation. The question is, does the added burden and inconvenience to the Defendants justify prohibiting the amendment, when the Federal Rules clearly contemplate the liberal amendment of pleadings? Neither Defendants nor Smith have stated precisely which witnesses, if any, will need to be redeposed; nor have they described precisely how the scope of discovery will be expanded. In fact, the parties have not specifically informed the Court what discovery has been taken to date. Without more precise proffers of prejudice from the Defendants, the Court finds that generalized inconvenience and cost is not alone enough to justify denying the motion to amend, which Rule 15(a) contemplates should be freely allowed.

B. Bad Faith

Defendant Inns of Distinction next raises a bad-faith objection to Smith's Motion to Amend based on the administrative complaint that she filed with the Pennsylvania Human Resources Commission ("PHRC Complaint") on July 14, 2005. In the PHRC Complaint, Smith describes Reagoso's presence at the meeting where she was demoted from Director of Sales to Director of Catering. Meanwhile, Smith also asserts that she "discovered new information

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[12] Howze v. Jones & Laughlin Steel Corp., 750 F.2d 1208, 1212 (3d Cir. 1984).

[13] Defs.' Opp'n [Doc. # 29], at 4.

during Discovery implicating each of the proposed additional defendants. Reagoso, president and sole shareholder of Inns, personally participated in and even directed many of the decisions that led to the unlawful actions taken against [her]."[14] Based on this, Inns of Distinction argues that Smith lacks credibility when she claims that Reagoso's personal involvement is newly discovered information, and that her Motion to Amend, at least with respect to Reagoso, should be denied based on evidence of bad faith.

The Court notes that the PHRC Complaint names Reagoso and three other hotel officers—Thierry Bombard, Randy Howat, and Charles Brush—who attended the meeting where Smith was demoted. The PHRC Complaint is brief, and written in the passive voice, so it is impossible to determine who allegedly said what, and who allegedly made the decision to demote her. Although one could infer that Reagoso personally directed the decision to demote her, the PHRC Complaint simply states that "I was then given a new job description as Director of Catering." Therefore, it is not clear from the PHRC Complaint alone that Smith knew at the time that Reagoso bore the responsibility for demoting her.

Moreover, she does not seek to add Bombard, Howat, or Brush as defendants, who purportedly were also present at that same meeting. Therefore, the Court disagrees that one can automatically infer that Smith is acting in bad faith by adding Reagoso now. Frankly, it is not clear what Smith discovered that prompted her to add Reagoso as a defendant. Under the liberal amendment rules, however, the presumption is to allow the amendment unless there are clear grounds for denial. The Court does not find that the PHRC Complaint alone establishes sufficient grounds to bar adding Reagoso under Rule 15(a).

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[14] Mot. to Join [Doc. # 18], at 6.

C. Futility

Finally, Defendants assert that the proposed amendments, if allowed, are not legally valid, and thus amending the Complaint would be a futile exercise. According to this theory, "the trial court may properly deny leave to amend where the amendment would not withstand a motion to dismiss."[15] Thus, the Court has reviewed each of the proposed claims to determine whether they are legally cognizable.

1. Proposed Claims Against Reagoso and Rosenthal as Individuals

a. ADEA

The ADEA prohibits an employer from, among other things, discharging or otherwise discriminating against any individual "with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age."[16] Furthermore, the ADEA defines "employer" to mean "a person engaged in an industry affecting commerce who has twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year" or "any agent of such a person."[17] Thus, the question is whether Reagoso and Rosenthal, as individuals, can be considered employers under the ADEA.

The Third Circuit has answered this question in the negative, in a recent decision noting that a high-level decisionmaker employed by the defendant is not liable under the ADEA in his individual capacity, even if he himself caused the ADEA violation. In Hill v. Borough of

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[15] Massarsky v. Gen. Motors Corp., 706 F.2d 111, 125 (3d Cir. 1983).

[16] 29 U.S.C. § 623(a)(1) (2000).

[17] 29 U.S.C. § 630(b) (2000).

Kutztown,[18] the court of appeals reversed the trial judge's decision to dismiss plaintiff Hill's ADEA claim against a municipality. Hill, a city engineer, brought the ADEA claim for constructive discharge based on allegations that the mayor harassed him in the workplace by, among other things, maliciously threatening to fire him.[19] The court of appeals, finding that the trial court erred in dismissing Hill's ADEA claim, noted in passing that "Hill did not bring an ADEA claim against Mayor Marino himself, nor could he have because the ADEA does not provide for individual liability."[20] As support for this proposition, the court of appeals cited decisions from the Seventh,[21] Fifth,[22] and Eleventh[23] Circuits.

Therefore, because this Court finds that the law of this circuit would not recognize ADEA claims against individuals, the Court will not allow Smith to name Rosenthal and Reagoso as defendants in the amended complaint.

b. PHRA

Like the ADEA, the PHRA prohibits an employer from discriminating against an

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[18] 455 F.3d 225 (3d Cir. 2006).

[19] Id. at 232.

[20] Id. at 246 n.29.

[21] Horwitz v. Bd. of Educ., 260 F.3d 602, 610 n.2 (7th Cir. 2001) ("We have suggested that there is no individual liability under the ADEA.").

[22] Medina v. Ramsey Steel Co., Inc., 238 F.3d 674, 686 (5th Cir. 2001) ("The ADEA provides no basis for individual liability for supervisory employees.") (internal quotation omitted).

[23] Smith v. Lomax, 45 F.3d 402, 403 n.4 (11th Cir. 1995) (holding that plaintiff cannot pursue ADEA claims against individual board members of a municipality, even though their conduct was the basis for the ADEA suit).

employee based on her age "with respect to compensation, hire, tenure, terms, conditions or privileges of employment."[24] Unlike the ADEA, however, the PHRA expands liability by providing that it is unlawful "for any person, employer, employment agency, labor organization or employee, *to aid, abet, compel, or coerce* the doing of any act declared by this section to be an unlawful discriminatory practice."[25] The Third Circuit has construed this provision to sweep in individual defendants who are not necessarily the plaintiff's employer.[26] Therefore, the Court finds that the proposed amended complaint supports PHRA claims against Rosenthal and Reagoso in their individual capacities, and will not bar those claims as futile.

c. FMLA

Under the FMLA, "an eligible employee shall be entitled to a total of 12 workweeks of leave during any 12-month period for . . . a serious health condition that makes the employee unable to perform the functions of the position of such employee."[27] The leave-taking employee is also entitled to restoration of her position after taking such leave.[28] The FMLA further provides that "it shall be unlawful for any employer to interfere with, restrain, or deny the

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[24] 43 Pa. Cons. Stat. Ann. § 955(a) (2006).

[25] Id. § 955(e) (2006) (emphasis added).

[26] See, e.g., Dici v. Pennsylvania, 91 F.3d 542, 552 (3d Cir. 1996) (holding that plaintiff's direct supervisor, a state police officer, was a proper individual defendant in a PHRA suit in which plaintiff alleged that the supervisor "repeatedly refused to take prompt action to end the harassment directed at plaintiff").

[27] 29 U.S.C. § 2612(a)(1) (2000).

[28] Id. § 2614(a).

exercise of or the attempt to exercise, any right provided [by the Act.]"[29] Thus, the relevant question again is whether Reagoso and Rosenthal are employers under this framework, thus subjecting them to individual liability.

Although it appears that the Third Circuit has not yet addressed the question,[30] the U.S. Department of Labor's implementing regulations provide that "individuals such as corporate officers 'acting in the interest of an employer' are individually liable for any violations of the requirements of the FMLA."[31] Although such regulations do not bind this Court, "courts owe deference to an agency's interpretation of the statute and regulations it administers."[32] The Department of Labor's interpretation of the FMLA, along with a growing consensus among the courts that the FMLA permits individual liability,[33] convince the Court that Smith's FMLA claims against Reagoso and Rosenthal should not be barred at this stage.

d. COBRA

Under COBRA, an employee may opt to continue health-insurance coverage equivalent to other qualified beneficiaries for at least eighteen months, after a qualifying event

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[29] 29 U.S.C. § 2615(a)(1) (2000).

[30] See Hewett v. Willingboro Bd. of Educ., 421 F. Supp. 2d 814, 817 n.4 (D.N.J. 2006) ("The Third Circuit has yet to decide the issue of individual liability under the FMLA.").

[31] 29 C.F.R. § 825.104(d) (2006).

[32] NVE, Inc. v. Dept. of Health and Human Servs., 436 F.3d 182, 186 (3d Cir. 2006) (citing Chevron U.S.A, Inc. v. NRDC, 467 U.S. 837 (1984)).

[33] Hewett, 421 F. Supp. 2d at 817 n.4 ("Both parties [to this suit] recognize, and this Court agrees, that the FMLA permits individual liability within the private sector."); see also Mitchell v. Chapman, 343 F.3d 811, 827–28 (6th Cir. 2003) (describing fifteen district-court decisions that allow individual liability under the FMLA).

occurs.[34] A qualifying event includes "the termination . . . of the covered employee's employment."[35] The COBRA framework requires the health-plan administrator to notify the terminated employee of her continuation-of-benefits rights,[36] and the ERISA framework[37] provides a cause of action to enable the aggrieved employee to "recover benefits due to [her] under the terms of the plan,"[38] and to collect a penalty from a health-plan administrator who fails to meet the COBRA notice requirements.[39]

At least one court of appeals has upheld a finding of individual liability upon the owner of a closely held corporation under COBRA, based on a legal determination that he served as the plan sponsor of the group health plan for the employees of a series of chiropractic clinics.[40] In McDowell, plaintiff McDowell lost his job at defendant Krawchison's chiropractic clinic, and was assured by the clinic staff that his health coverage would continue.[41] When his wife was later denied pre-approval for cancer treatment based on a lapse in the insurance, McDowell sued both the clinic and Krawchison individually under COBRA, to recoup the lost health-insurance

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[34] 29 U.S.C. § 1161(a) (2000).

[35] Id. § 1163(2) (2000).

[36] Id. § 1166(a)(4)(A) (2000).

[37] The continuation-of-benefits portion of COBRA is contained within the ERISA framework.

[38] 29 U.S.C. § 1132(a)(1)(B) (2000).

[39] Id. § 1132(c)(1).

[40] McDowell v. Krawchison, 125 F.3d 954, 961 (6th Cir. 1997).

[41] Id. at 956–57.

benefits.[42] The McDowell court first noted that under ERISA, if no health-plan administrator is named, the plan sponsor has the duty to notify an employee of her COBRA rights.[43] The court then went on to hold that because Krawchison was the "sole owner and officer of most of the clinics, and the single common link among all of the clinics," that he was also the plan sponsor and hence liable individually for the COBRA violations at issue.[44]

The court in McDowell engaged in a detailed factual anaylsis at the summary-judgment stage to reach these conclusions. In contrast, this Court has little factual detail about the case. But because the Court finds that the allegations in Smith's proposed amended complaint are not inconsistent with a potential finding of individual liability under COBRA, the Court will not bar Smith's COBRA claims against Rosenthal and Reagoso as futile.

2. Proposed Claims Against DePalma and FWHI Beverage

According to the proposed amended complaint, DePalma and FWHI Beverage took over managing the Wyndham on May 1, 2005, after Smith had been fired.[45] Consistent with this timeline, Smith does not allege that DePalma or FWHI Beverage participated in demoting or terminating her. She does, however, contend that they "joined in this conduct once they replaced Inns and Reagoso as managers of the Hotel,"[46] suggesting that they are also liable under the ADEA and PHRA. She also alleges that DePalma and FWHI violated the FMLA by "failing to .

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[42] Id. at 957.

[43] Id. at 962 (citing 29 U.S.C. 1002(16)(A)).

[44] Id. at 962–63.

[45] Proposed Am. Compl. ¶ 26.

[46] Id.

. . restore Plaintiff to her position,"[47] and that they both violated COBRA by "knowingly fail[ing] and refus[ing] to grant Plaintiff her continuation coverage rights under COBRA."[48] Thus, Smith's theory is that these entities are liable as successors-in-interest to Defendants. Smith, however, has not demonstrated how the ADEA, PHRA, and COBRA provide for relief from a successor-in-interest. In addition, the Court's independent review of those statutes indicates that neither Congress nor the Pennsylvania Legislature contemplated such successor liability in the respective definitions of "employer."

Congress's definition of "employer" in the FMLA, however, does specifically include "any person who acts, directly or indirectly, in the interest of an employer to any of the employees of such employer; and *any successor in interest of an employer*."[49] The implementing regulations suggest that determining whether DePalma and FWHI Beverage are successors to Defendants under the FMLA is a fact-driven inquiry.[50] Therefore, the Court finds that Smith's claims against DePalma and FWHI Beverage are not futile, and therefore should not be barred at this stage. Her ADEA, PHRA, and COBRA claims against them, however, will be barred as futile.

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[47] Id. ¶ 49.

[48] Id. ¶ 53.

[49] 29 U.S.C. § 2611(4)(A) (2000) (emphasis added).

[50] See 29 C.F.R. § 825.107 (2006) (requiring analysis of factors such as "substantial continuity of the same business operations," "continuity of the work force," and "similarity of supervisory personnel").

III. CONCLUSION

Therefore, the Court will grant Smith's Motion for Leave to File an Amended Complaint, subject to the legal determinations in this Memorandum Opinion. Accordingly, Smith is not permitted to add ADEA claims against Reagoso and Rosenthal, nor is she permitted to add ADEA, PHRA, or COBRA claims against DePalma and FWHI Beverage. Further, Smith is not permitted to add any additional allegations or theories of relief that are not contained in the proposed amended complaint that the Court reviewed for this decision.

An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BONNIE SMITH,	:	
Plaintiff,	:	
vs.	:	**CIVIL NO. 06-1473**
GENESIS VENTURES I, LLC, *et al.*,	:	
Defendants.	:	

ORDER

AND NOW, this 8th day of December, 2006, it is hereby

ORDERED, that Plaintiff's Motion for Leave to File Reply Brief [Doc. # 31] is **GRANTED**; it is further

ORDERED, that Plaintiff's Motion for Leave to File Amended Complaint [Doc. # 28] is **GRANTED IN PART**; and it is further

ORDERED, that within seven days, Plaintiff will revise and file with the Clerk the Amended Complaint, in accordance with the directions of the foregoing Memorandum Opinion.

BY THE COURT:

/s/ Cynthia M. Rufe

CYNTHIA M. RUFE, J.